

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 95B149

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

LEE E. DORSEY,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES,
COLORADO MENTAL HEALTH CENTER AT PUEBLO,

Respondent.

Hearing in this matter commenced on June 12, 1995 and concluded on August 21, 1995.

Complainant appeared in person and represented himself. Respondent appeared through Robert L. Hawkins, assistant superintendent for clinical services, Colorado Mental Health Center at Pueblo, Department of Human Services, and was represented by Stacy Worthington, senior assistant attorney general.

Complainant called Irene Drewnicky and Kaye Baxter as witnesses and also testified in his own behalf. Respondent called Scott Hertneky, Irene Drewnicky, Pete Godinez, and Robert L. Hawkins, as witnesses.

Complainant's exhibit A (previously marked as respondent's exhibit 20) and respondent's exhibits 1 through 19 were admitted without objection. Complainant's exhibit B was admitted over objection.

MATTER APPEALED

Complainant appeals the termination of his employment as a psychiatric care technician for failure to comply with standards of efficient services or competence and willful misconduct pursuant to State Personnel Board rule R8-3-3(C)(1) and (2) and violation of Colorado Mental Health Institute at Pueblo policy 16.15, adult patient abuse/neglect.

ISSUES

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1. Whether complainant committed the acts alleged.
2. Whether the action taken by the appointing authority was arbitrary, capricious, or contrary to rule or law.
3. Whether either party is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

1. Complainant Lee Dorsey was employed as a psychiatric care technician ("LPT") at the Colorado Mental Health Center at Pueblo, Department of Human Services from March, 1991 to April 24, 1995.
2. On April 4, 1995, Lee Dorsey was assigned to the second shift on the General Adult Patient Services ("GAPS"), ward 81. Among his duties was dispensing medications to patients.
3. Barbara Jaramillo, an RN, was the supervisor of the second shift; however, she was called off the ward for a time during the shift and Scott Hertneky, RN, was the next employee in the supervisory chain.
4. As part of his duties to dispense medication during the shift, Dorsey had the key to the drug cabinet. Scheduled or controlled drugs are kept under lock. Narcotic drugs, such as Darvocet N100, are considered scheduled drugs. Antivan is also considered a scheduled drug.
5. At the CMHIP, scheduled medications are kept in a locked drawer usually in clear plastic bags. When a patient is to be given a scheduled drug, the employee in charge of dispensing medication unlocks the drawer, takes out the medication, enters the information on the sign off sheet for the drug, administers the medication and notes the drug, date, time and dosage on the patient's chart.
6. Although it is considered contrary to appropriate protocol, the employee assigned to dispense medications, sometimes notes all the medications given to patients on one sheet and transfers the data to the appropriate sheets and charts at one time. When this practice is followed, the actual time the medication was given is noted, not the time the notation was made in the appropriate record.
7. It is essential to note accurately the date, time and dosage of medication given to a patient. If given too frequently some medications, especially scheduled medications, can cause dangerous side effects, including death.

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8. Medication may be distributed on two types of timetables pursuant to doctor's orders: regular, i.e., every four hours or before bedtime; and, prn, i.e., as needed every eight hours.

9. The medications at issue here were to be administered prn. Patients at CMHIP are given medications prn upon their request, provided that the dosage is within the time limits noted on the prescription and there are no contraindications present.

10. On April 4, 1995, patient BC approached Scott Hertneky requesting he be given a Darvocet N100 which was prescribed for him prn every 8 hours. Hertneky told BC to see Dorsey who was in charge of dispensing medications that shift. Later in talking with BC, Hertneky asked if BC got his medication. BC responded, "I'm not going to beg."

11. Hertneky took this comment to mean BC had not received his medication as requested. At this time, Dorsey had gone for his supper break. Hertneky checked the medication sheet and found that it did not indicate BC had received any Darvocet. Hertneky gave the medication to BC at approximately 7:50 p.m. and noted it appropriately.

12. Hertneky realized, based on the notations and a count of the medications, that one Darvocet and one Ativan were missing. Hertneky notified Barbara Jaramillo upon her return to the ward of the missing medication.

13. Jaramillo, Hertneky and another LPT re-counted and confirmed that one Darvocet and one Ativan was missing. Jaramillo contacted her supervisor, Pete Godinez, about the incident. Godinez said they would discuss it the next day.

14. Upon Dorsey's return to work, Hertneky told him of the missing medications. Dorsey indicated he "would take care of it."

15. On April 5, BC's regular medications to be given before bedtime were found in the patient's drawer. The drugs had not been administered the night before. Godinez took the drugs in the paper dispensing cup, wrote the patient's name on the bottom of the cup and placed it in his file cabinet.

16. Godinez, Jaramillo and Ed Espinoza, the team leader, arranged a meeting with Dorsey on April 5 during his shift. During the conversation, Irene Drennicky, division director of GAPS, called Godinez's office looking for Espinoza. Godinez explained the meeting being held and the subject of that meeting. Drennicky was asked to join them and she did.

17. During the meeting, Dorsey made several inconsistent statements as to whether and when he had given the Darvocet and

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Antivan to BC. He indicated that he gave the medication to BC but had not noted it. He said he gave the medication to BC with his regular medications, which were to be given at bedtime. At one point, in response to questions, he said that he himself had taken the medication. Dorsey noted on the log that he gave BC Darvocet and Ativan at 11:30 p.m.

18. After Dorsey said he had given BC the medication with his other medication at bedtime, Godinez brought out BC's nighttime medications in the paper dispensing cup. Given the CMHIP practice of checking the patient medicine drawers daily, the medication could not have been for any time other than the evening of April 4.

19. During this meeting, Dorsey appeared to the others to be under the influence of drugs. His speech was slurred, he communicated in incomplete sentences, his thought process was disorganized and he was restless.

20. Irene Drennicky said he would need to remain at the nurses' station while the three supervisors determined what to do. Upon consultation with her supervisor, Drennicky decided to request a blood test and to call the department of public safety at CMHIP and request an investigation.

21. Drennicky advised Dorsey of her decision and asked that he continue waiting at the nurses station.

22. Dorsey left the nurses station. He asserts that he contacted an attorney, talked instead to an investigator in the attorney's office, and was advised to leave and not cooperate in the investigation or blood test.

23. Dorsey has been on medication for depression and for pain.

24. During the conduct of the investigation Dorsey was placed on leave with pay. Upon receiving the results of the investigation, Robert L. Hawkins, the assistant superintendent for clinical services at CMHIP notified Dorsey that he would hold a meeting pursuant to Board rule 8-3-3.

25. The 8-3-3 meeting was held on April 18, 1995. Dorsey was present with counsel.

26. After the meeting, Hawkins reviewed Dorsey's work history. Dorsey had received disciplinary action in December, 1994 and has received a needs improvement rating on a PACE evaluations in December, 1994.

27. Hawkins determined that Dorsey had failed to follow the appropriate hospital and nursing protocol by failing to record the controlled medication; that he was insubordinate in leaving his

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post and the hospital after having been directed by Drewnicky to remain; that Dorsey had reported to work in an impaired state on April 5, 1995; and, that Dorsey took the Darvocet N 100 for his own personal use. Hawkins noted that, in his managerial opinion, any of these actions standing alone would justify termination.

28. Complainant Lee Dorsey's employment with CMHIP was terminated effective April 24, 1995. Complainant filed an appeal on April 28, 1995.

DISCUSSION

This is an appeal of a termination of employment of a certified employee. The burden of proof, therefore, is upon the respondent to prove by a preponderance of the evidence that the complainant committed the acts alleged. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994).

This case turns on credibility determinations. When there is conflicting testimony, as here, the credibility of witnesses and the weight to be given their testimony is within the province of the administrative law judge. Charnes v. Lobato, 743 P.2d 27 (Colo. 1987). This administrative law judge is guided by the factors set forth in Colorado Jury Instruction 3:16:

You are the sole judges of the credibility of the witnesses and the weight to be given their testimony. You should take into consideration their means of knowledge, strength of memory and opportunities for observation; the reasonableness or unreasonableness of their testimony; their motives; whether their testimony has been contradicted; their bias, prejudice or interest, if any; their manner or demeanor upon the witness stand; and all other facts and circumstances shown by the evidence which affect the credibility of the witnesses. If you believe that any witness has wilfully testified falsely to any material fact in this case, you may disregard all or any part of the witness' testimony.

In applying the above factors to each witness, the conclusion is drawn that respondent's witnesses are worthy of belief and, accordingly, their testimony is given substantial weight. The testimony of Complainant Lee Dorsey is disregarded for the reasons explained below.

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Complainant's testimony is not credible. He argues that he and the staff at CMHIP have historically not gotten along well. He asserts that, for this reason, he left his work on April 5 in direct violation of his supervisor's direction to stay at the nurses' station. He claims that he did give the medication to BC but either that he did so at BC's bedtime at about 11:30 p.m., or that he gave it to BC when he first requested at dinnertime but noted on the chart at 11:30 p.m. Either of these explanations admit conduct that is grounds for discipline.

Respondent has met its burden in this case. The evidence supports the conclusions of the appointing authority. The discipline imposed was within the realm of available alternatives. Rule R8-3-3(A), 4 Code Colo. Reg. 801-1.

There is no evidence to support an award of attorney fees under section 24-50-125.5, C.R.S. (1988 Repl. Vol. 10B).

CONCLUSIONS OF LAW

1. Complainant committed the acts alleged.
2. Respondent did not act arbitrarily, capriciously or contrary to rule or law.
3. Neither side is entitled to an award of attorney fees or costs.

ORDER

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this ____ day of
August, 1995, at
Denver, Colorado.

Mary Ann Whiteside
Administrative Law Judge

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NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties and advance the cost therefor. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ - APPELLANT - must pay the cost to prepare the record on appeal. The estimated cost to prepare the record on appeal in this case without a transcript is **\$50.00**. The estimated cost to prepare the record on appeal in this case with a transcript is **\$750.00**. Payment of the estimated cost for the type of record requested on appeal must accompany the notice of appeal. If payment is not received at the time the notice of appeal is filed then no record will be issued. Payment may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. If the actual cost of preparing the record on appeal is more than the estimated cost paid by the appealing party, then the additional cost must be paid by the appealing party prior to the date the record on appeal is to be issued by the Board. If the actual cost of preparing the record on appeal is less than the estimated cost paid by the appealing party, then the difference will be refunded.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 1/2 inch by 11 inch paper only. Rule R10-10-5, 4 Code of Colo. Reg. 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 Code of Colo. Reg. 801-1. Requests for oral argument are seldom granted.

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PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 Code of Colo. Reg. 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

CERTIFICATE OF MAILING

This is to certify that on the ____ day of August, 1995, I sent true copies of the foregoing INITIAL DEICSION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

***Lee E. Dorsey
416 So. Hahn's Peak Pl.
Pueblo West, CO 81007***

and in the interagency mail, addressed as follows:

***Stacy L. Worthington
Assistant Attorney General
Department of Law
Human Resources Section
1525 Sherman Street, 5th Fl.
Denver, CO 80203***

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